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ECONOMICS AND JURISPRUDENCE

AN ADDRESS

BY

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ECONOMICS AND JURISPRUDENCE.

It is with no thought of subjecting to analysis any abstruse doctrine of political economy, or of discussing any legal question as a lawyer might discuss it, that I invite your attention for the few moments I have the honor to address you, to a consideration of the relation between Economics and Jurisprudence. My purpose, though less comprehensive, is more definite. Convinced as I am that much of the confusion in economic theory and much of the discord in industrial life, are alike due to inadequate expression by formal law of fundamental industrial rights, I desire to point out, as well as I may, the character of that confusion and discord, and to suggest the line along which evolution in jurisprudence must proceed in order that harmony in economic theory and peace in the business world may be established.

It may be well at the outset to explain the cast of meaning attached to the word jurisprudence. As employed throughout this discussion it does not seek to confine the mind to the idea of positive law; that is to say, to statutory enactments or court precedent. From Cicero we learn that "the study of law must be derived from the depths of philosophy, and by an examination of the human mind and human society principles may be discovered in comparison with which the rules of positive law are of but trivial importance." It is in this larger sense that use is made of the word jurispru-

dence. The idea which it conveys strikes at the root of human relations, and the reasoning which it implies touches rights and duties that are fundamental. It is at once a philosophy, a science, and an art. As a philosophy, its desire is to understand justice; as a science, its purpose is to explain the evolution of justice; as an art, its aim is to formulate those rules of conduct essential to the realization of justice. Conceived in this manner, jurisprudence forms the background of all associated activity; it provides the framework that limits and controls the exercise of liberty; it reflects the color and resounds the tone of those unconscious premises of action which give character to a civilization. The law is neither a schoolmaster for instruction, nor a guardian for command; it is, rather the expression of the ethical sense of a community crystallized about the problem of common living.

Now, it is clear that jurisprudence, defined as I have endeavored to define it, must be subject to a development corresponding to that of a society whose ethical ideals it is designed to express. It may be true that justice as a philosophic concept is the same for all peoples and at all times, but whether this be true or not, the rules for the guidance of conduct vary with the ever varying conditions under which that conduct takes place. Thus, every change in the social structure, every modification of the principle of political or industrial association, as well as the acceptance of a new social ideal, must be accompanied by a corresponding change in those rights and duties acknowledged and enforced by law. Should this

development in jurisprudence be arrested or proceed sluggishly, as compared with that of some particular phase of associated action, serious mischief will inevitably follow. This is true because such unequal development would evidence the general appreciation by men that the law fails to express rights which they hold to be fundamental; and it is the universal testimony of history that every desire for a right or a privilege common to any considerable number of men, yet of such a sort that it is opposed by the common law of conduct, will find expression through an appeal to a higher law, a divine law, a natural law, an ethical claim, an historic necessity, or some other phrase pressed into the service of agitators whenever an appeal is taken from that which is to that which should be. If, now, this desire, asserted as a natural right merely because it is not acknowledged by the philosophy of jurisprudence, be in reality an historic product, and, therefore, an enduring force, it is futile to expect the restoration of harmony until either the established system of jurisprudence shall assert its authority and repress the aspiration of those who seek the orderly expression of unusual rights, or until, this aspiration being acknowledged as just, the interest which it represents is incorporated in a reformed system of jurisprudence. In the one case, harmony of life will be restored but progress arrested; in the other, harmony will be realized as the result of progress.

In all this there is nothing new. This theory respecting the evolution of approved conduct is found in all treatises upon the Science of Jurisprudence. The

sense of a right, must, from the nature of the case, precede the expression of a right. The stimulus of moral fervor is essential to a reform in the social order. The only strange thing in the situation is that, while this is easily seen with regard to controversies of the past, it is with difficulty appreciated when a controversy that touches our own lives is the subject of analysis; and what I have to say this evening, will interest you, not because it contains any novel conception respecting the evolution of jurisprudence, or the content of economics, but rather because it is an effort to consider the present industrial situation in the light of this acknowledged evolutionary process, and to derive from this consideration some help in answering the many perplexing questions of ethics and expediency that arise from out the social turmoil in which we live.

So broad a theme cannot, of course, be adequately presented in a single address, and my further remarks will, therefore, be confined to the elucidation of three points designed to show how the industrial development of the past one hundred years has disturbed the once harmonious relations between economics and jurisprudence. I shall, in the first place, endeavor to explain why the individualism of the eighteenth century fails to express the moral necessities of the present industrial order. I shall, in the second place, endeavor to show that the principle of responsibility, which is the cornerstone of English jurisprudence, is incapable of industrial application under existing industrial conditions. I shall, in the third place, consider what is necessary for the realization

of industrial liberty and attempt to place in its proper light the assertion that there is no industrial liberty without industrial property.

I.

Following the order suggested, our first task is to explain how the industrial development of the past one hundred years, starting under the protection of an industrial philosophy approved by the advanced thought of the time, has wrought such changes in the organization and structure of industry, that the philosophy in question is now regarded as a retained advocate for the conservative interests of society. We need not pause to describe this philosophy. The individualism of the eighteenth century is something very real in the world of thought, and its application to industry suggests the content of English political economy. The spirit of this philosophy is found in Adam Smith when he protests in the name of natural law against positive law and established customs; it is found in Ricardo when he accepts the margin of profit as the measure of potential progress; it is found in Senior when he applies his doctrine of saving to the solution of all industrial problems he sees fit to recognize; it is found in John Stuart Mill, and is the explanation of his attempt to crystallize industrial analysis about the commercial law of supply and demand. Speaking generally, industrial expression is given to this philosophy in the doctrine of *laissez faire*, in the severance of industry from the state, and in the advocacy

of natural law in the business world. The line of argument which gives it support also, is as familiar as the philosophy itself. It is assumed that the interests of all are identical and that, on this account, there is no necessity for government to prescribe the conditions of industrial conduct, except so far as they may be prescribed by inference from the established institution of private property. The social interest is either lost to view, or is conceived as nothing more than an aggregate of individual interests.

The modern economist experiences no difficulty in pointing out the error of such reasoning. The individual interest may be, and in some cases is observed to be, at variance with the social interest. Self aggrandizement, a not uncommon manifestation of self-interest, may, and usually does, set in train forces that are distinctly anti-social. But, fortunately for the world, a negative criticism unaccompanied by constructive suggestions exerts little influence, a truth which applies with especial force to the case in hand. It is not possible for any formal argument to break the influence of that theory of human relations which centers in the needs of the individual man. Individualism is an historic force and not a formal argument. It existed before philosophy undertook its explanation by an appeal to natural law, and it will continue to exist long after the narrow theory of natural law that once gave it support, shall have disappeared. It has been the vital principle of the business code of the English speaking people during the past six centuries. It is bound up in the emancipa-

tion of the worker from the restraints of serfdom, in the evolution of property, in the assertion of intellectual liberty, in the development of popular government and in all that goes to make up a society adjusted to the idea of autonomy and spontaneity. It is the essence of that chapter of English jurisprudence which applies liberty to business. It is the sweep of modern history and not the speculations of eighteenth century philosophers, or of nineteenth century economists, which gives sanction to the rule that it is moral for the individual to assert himself. The conditions under which individualism originated, grew, and secured for itself a philosophic expression, must have been such that equity and progress, both social and personal, resulted from its influence, for it could not otherwise have developed. At present, however, the workings of self-interest in the industrial field do not in all respects appear to be in harmony with the ideals of justice, and there are many who profess to see that it places in jeopardy material progress itself. There can be but one explanation of this reversal in the judgment of mankind, and that is, that significant changes have taken place in the industrial conditions to which the theory of individualism is applied. It is, therefore, incumbent upon us to inquire in what particular the industrial present differs from the industrial past, and what modification in the old conception of society is implied in these changed conditions.

The Industrial Revolution, by which tools gave place to machinery and domestic industry was superseded by

the factory system, has been so frequently described as to require no further comment. The changes referred to are indeed important, and have set in motion so many and such varied social influences as to justify the name of a Revolution. At the same time it must be admitted that the employment of machinery in the domain of production could not have resulted in the highly differentiated society in which we now live, had it not been for the application of machinery to the service of transportation. We are just beginning, in the closing years of this century, to appreciate the social, industrial and moral significance of railways and steam navigation. It is the modern system of transportation that has revolutionized the world of morals. It is the railway that has destroyed localism in government, in industry, in thought and in interest. It is steam navigation that has created a world's market and removed the chief barrier to the concentration of capital and the growth of great industries. It is the new commercial system that has removed the buyer from the seller, and in so doing, relieved business from the restraining influence of business courtesy. Thus the outlook upon life has been changed. The point of view from which we contemplate human relations has been shifted from the individual to the whole. It is not strange that a revision in the industrial code should have been necessitated by so stupendous a change in the character of industry.

The development of steam transportation also furnishes the stimulus for that movement in morals which characterizes the closing years of the present century.

There are those who consider the universal interest in social questions as evidence of a broadening sympathy among men and of an approach toward brotherly kindness. This may be true, but we should be very careful not to plume ourselves upon a righteousness we cannot help. The current interest in social problems results, in large measure, from the fact that we are all sailing in the same boat. The demand for brotherhood is in some degree at least, an expression of the instinct of self-preservation. Were it certain, for example, that a strike or lockout could in no way touch our lives, is it likely we should be so ready to pronounce judgment upon the merits of the controversy? Should we not continue to say, as our forefathers said, that a quarrel to which we are not parties, is of no interest to us? It is because our interests are affected by every industrial quarrel that we are forced to an opinion respecting it. In this fact do we find the characteristic difference between the society of the present and that of an hundred years ago. The rise of socialism and the spread of collectivism are traceable to the increased interdependence among men, and the recognition of society as an organism is traceable to the same fact. All these conceptions of social relations are imposed upon us by external conditions, and it seems clear that a new system of ethics, a new expression of rights and duties, indeed a new definition of liberty and of the individual himself, must be crystallized and incorporated into the established system of jurisprudence, before harmony can be restored between the accepted rule of conduct and these new demands of the moral sense.

There is another event recorded by industrial history which, equally with the substitution of nationalism for localism in industry, shows the necessity of a new interpretation of industrial relations. I refer to the appearance of corporations and to the completeness with which they have transformed the industrial structure. The word corporation opens an almost limitless field of investigation to the student of industrial history, but I shall venture only a few words respecting them, to suggest in what manner the development of this form of association has contributed to the current confusion respecting industrial rights and industrial duties. Corporations originally were regarded as agencies of the state. They were created for the purpose of enabling the public to realize some social or national end without involving the necessity of direct governmental administration. They were in reality arms of the state, and in order to secure efficient management, a local or private interest was created as a privilege or property of the corporation. A corporation, therefore, may be defined in the light of history as a body created by law for the purpose of attaining public ends through an appeal to private interests.

A corporation, as it appears in this latter half of the nineteenth century, differs in every essential particular, from the original conception out of which it grew. Its public purpose and its dependence on government have been lost to view, while its character as a private industrial concern has been especially emphasized. Three points respecting the modern corporation should be

noted in order to appreciate the influences which emanate from it.

First. The growth of the corporation and the consequent centralization of industrial power is only limited by the market for the goods which it produces or the services which it renders. This is true because the credit of corporations is practically without limit. The bearing of this fact may easily be perceived. It was assumed by those who formulated the doctrine that the principle of competition was an adequate guarantee of justice and equity in business affairs, that any particular business would be represented by a large number of independent and competing organizations. If, however, what I have said respecting the growth of corporations be true, it is clear that their development tends to destroy the conditions under which competition is alone able to perform its beneficent service.

Second. Corporations are coming to conceive of themselves as business associations of perpetual life. The contracts which they enter into bind not only the present but the future, and, when it is understood that gain in the present is the motive directing these contracts, it is easy to see that the best interests of the future may be jeopardized. I cannot suggest even, at this time, the far reaching consequences of this peculiarity of corporate organization, but must content myself with the remark, that the considerations which led reasonable men of half a century ago to approve the philosophy of industrial individualism, did not include the observation that a body of men organized for the purpose of private gain

should ever plead the interests of a perpetual existence. Such a plea, it was assumed, pertained to the state alone.

Third. Corporations do not recognize the principle of righteousness, candor, courtesy, or indeed, any of the personal virtues, except energy and enterprise, which, according to the old English economists, are assumed to be essential to continued business success. I do not say that the common virtues may not be appreciated by men entrusted with the management of corporate enterprises, or that they do not practice such virtues in their personal affairs; but such is the nature of intercorporate competition, especially for industries in which success is measured by the volume of business transacted, that the managers of corporations are obliged to recognize a dual code of ethics,—one for the business, one for the home. Whether or not a man ought to choose defeat rather than success under such conditions does not concern the present argument. Your attention was called to this peculiarity of corporate organization for the purpose of presenting yet another reason why the old rules of business conduct are not pertinent to the latest phase of industrial development. The old theory of society which assumes identity between personal interests and social morality, may possibly have been true when industries stood forth in the person of those who conducted them; but to claim that this is true as business is at present organized, is to ignore the influence which corporations have exerted upon the character of business. If it be true that the growth of a corporate enterprise is only limited by the world's demands, that its life is only lim-

ited by that of the civilization to which it pertains, and that it is deprived of those restraining influences which work so powerfully upon the individual, is it not clear that a new theory of industrial relations becomes a necessity?

For two reasons, then, and they illustrate rather than exhaust the considerations that might be submitted, it seems proper to assert that the theory of social action to which the code of industrial conduct was adjusted by English Economy, no longer describes with accuracy modern industrial society. Localism in industry has disappeared, while simplicity in organization is fast disappearing. The social interest, the social impulse, and the social aim must be more definitely recognized by the formal rules of conduct than was necessary when the locality and the individual were in reality, as well as in theory, the units in the economic order. Under the old individualistic rules of industry, morality centered in the individual life. No opportunity was presented for the evolution of social ethics, no necessity existed for testing motives by their social results. I will not say that the social theory with which this attitude of mind is in harmony was untenable at the time of its development. An opinion upon that point is unnecessary to our purpose. What I do assert is, that the rules of industrial conduct, formulated under such conditions, must fail to take into consideration all the facts of modern industrial life; and one may without serious effort arrive at the conviction that the industrial controversies of our own time are an endeavor so to reconstruct the code of

ethics that underlies the accepted system of jurisprudence that the social interest and the rights of individuals in associated industry may find a natural and an orderly expression.

II.

My second point, designed to show how industrial changes have interfered with the effective working of the accepted system of jurisprudence, pertains to the significance of rights and to the relation between rights and responsibilities. It brings into prominence what is, perhaps, the most fundamental characteristic of social organization, namely: the formula adopted for giving expression to the accepted code of associated action. All peoples who appreciate the stability and protection granted by formal law, express such rules of conduct as they deem wise, either in the language of duty or in the language of right. These concepts, it is true, can not be severed from each other. Every duty implies a right, and every right implies a duty; but this is not equivalent to saying that a society whose laws, judicial procedure, forms of administration, and rules of spontaneous conduct are adjusted to the theory of duty, is the same thing in character, or leads to the same results, as a society which proceeds in its adjustments from the theory of rights. The former, in its fundamental principle is theocratic; the latter is democratic. The conception of law in the former is that of a command imposed; the conception of law in the latter is that of opportunity offered. In a theocracy law finds its sanction in author-

ity and expresses itself as an obligation. Thou shalt not kill; Thou shalt not steal; Thou shalt not bear false witness:—such are its legislative expressions. In a democracy, law finds its sanction in the approval of the governed, and expresses itself as a quality inherent in the nature of the case. Man has a right to life, man has a right to property, man has a right to reputation:—such is the form of law suitable for a free people.

Nor does the contrast between the two principles of social organization stop here. In a theocracy (and by that I mean any society living under absolute authority,—it may be a monarchy) reliance is placed upon the strong arm of the state for the execution of law. The police power comes to be more important as the relations between men become more complex. In a democracy, on the other hand, laws are in a sense self-executory, being expressions of right. Each citizen looks upon government as a protector and appeals to government in case his rights are endangered. Thus law, when approved by the moral sense of the people (and under a mobile democracy nothing else can become law) rests for its execution upon the interested vigilance of all citizens. Each man feels that in the execution of the law his rights are preserved, and that in the development of the law his rights are enlarged.

It is evident that a society organized on the basis of right fits perfectly the requirements of English jurisprudence. It is the design of this system to confine its expression, to general principles fundamental in the code of conduct, and to allow the details of all associated

action to be arranged by voluntary association. This is what is meant by the *régime* of contract, and provided the fundamental rights are adequately expressed, and provided also, the conditions are such that the compelling force of responsibility works in the same manner for both parties to the contract, I for one, am willing to trust the safety of the present and the prospects of the future to voluntary association.

It is of the utmost importance, however, that these provisos be met. The rights and liberties expressed must be such as fit into the necessities of the case. The idea of property, for example, cannot be defined with safety by speculation and philosophy, but must adjust itself to the needs of voluntary association, the ultimate aim of association being held in view. The mistake of English political economy, as it seems to me, does not lie in the emphasis it gives to competition as a regulator of commercial conduct, but in its assumption that the *bourgeois* conception of property was ordained by nature and on that account, lay outside the influence of evolutionary forces. But I must set aside for a moment the consideration of this point.

It is also necessary for the satisfactory working of a society whose moral code is expressed in the formula of rights, that responsibility should attach itself to the exercise of liberty. The nature of responsibility must, of course, conform to the nature of the liberty it is designed to control, and dealing as we are with industrial forces, our analysis must content itself, in the application of this principle, with a consideration of industrial respon-

sibility. As already remarked, wherever the system of English jurisprudence holds sway, the details of associated action are the result of voluntary contract, and provided the terms of the contract do not jeopardize any public interest, the state concerns itself only with the task of enforcement.

At this point, however, the analysis must proceed with great care. The word, "enforcement," as employed in English legal procedure, has no thought of arbitrary action. It consists rather in the exacting of the penalty recognized in the contract, (either expressly stated, or implied in the common law under which the contract is drawn) and voluntarily assumed by both parties to the agreement. This exacting of the penalty is the means by which responsibility is brought to the support of voluntary association. Every contract, to be effective, must state or imply not alone the advantages to be secured by the consummation of the agreement, but also the nature and extent, of the loss to be sustained or reparation to be made, in case the agreement is not carried out. The application of this generalization to the industrial controversies of the present time leads to a most important conclusion. It is evident from the nature of the responsibility upon which reliance is placed for the enforcement of contracts, that all parties to an agreement must be commercially responsible; that is to say, they must be in the possession of some property, privilege, or advantage that may be placed in jeopardy as surety for their conduct. The great body of workmen, however, have no property, privilege, or advantage that they can place

in jeopardy as a pledge for the fulfillment of a labor contract, from which it follows that labor contracts, on one side at least, are bereft of responsibility, and consequently incapable of enforcement by the orderly procedure of English jurisprudence.

In the situation thus portrayed, do we find the explanation, first, of the reckless manner in which workmen frequently urge their claims; and second, of the tendency on the part of employers to appeal to force. The workmen are reckless because in the evolution of modern industry they have been bereft of all proprietary interest in the plant that gives them employment; the employers appeal to force because there is nothing else to which they can appeal for the restraint of propertyless men. Such is the explanation of the belligerent condition in which the industrial world at present finds itself.

Two or three thoughts are suggested by the above presentation of the situation. In the first place, this turning of the mind toward authority is proof of an incipient infidelity respecting the claims of a free society. It is an admission that the law of property has reached the limit of its evolution, and that it is incapable of giving expression to that refinement of rights which results from differentiation in the industrial process. Its logical outcome is the abandonment of the English system of jurisprudence. He who appeals to force turns his back upon a society whose moral code is expressed in the language of rights, and turns his face toward a society whose moral code is expressed in the language of duty.

The second suggestion is, in a sense, the reverse of the

one just mentioned. If it be true that the difficulty in the industrial situation arises from the fact that all men come into the industrial order by voluntary agreement, while the majority of men are in no way commercially responsible for the fulfillment of agreement, it is clear that one way of solving the difficulty would be to diffuse commercial responsibility. This, indeed, would be the conservative solution of the problem, for it demands a development within the accepted scheme of jurisprudence rather than a reversal of the established principles of jurisprudence. The truth is, the *régime* of contract cannot work unless all men are in substantially the same condition concerning property; not, I hasten to say, in the amount of property held, but in the relation which proprietorship establishes between the proprietor and industry. To demand, therefore, the diffusion of property, a phrase that I shall explain more fully in a moment, is a conservative demand, for the process it contemplates is essential to the conservation of the *régime* of contract which is the vital principle of liberty in the industrial world.

A third thought is, perhaps, worthy a moment's notice. One who appreciates the above explanation of industrial controversies has little interest in the minor questions that arise respecting the belligerent rights of the contracting parties. How black must be the scowl before it amounts to intimidation? How many men in how many ways may make how many kinds of conspiracy? If a man has a right to be disagreeable to his own employer because of a grievance of his own, has he an

equal right to be disagreeable because of the grievance of another worker? Are these not absurd questions? I will not say they are unnecessary, for the rights of belligerents in time of war are of great importance. My point is, that they are uninteresting to the student of economics because they add nothing to the evolution of industrial jurisprudence at the point where evolution is necessary in order to bring industry and law into harmony. The rôle of the economist should be to analyze the situation so as to express these suppressed labor rights, and prepare the way for bringing this period of industrial warfare to a close; and this should be accomplished, not by the enslavement of labor, but by imposing upon labor the responsibility without which liberty is but a name.

III

Let us now turn to a consideration of industrial liberty, which, according to the program laid down, is the third and last point to claim our attention. I shall attempt no definition of liberty, but rest content with the historic prejudice in favor of personal independence and self-realization which is the common possession of all Anglo-Saxon peoples. The liberty of the eighteenth century accepted by the early French and English economists as the background of industrial life, submitted two demands: First, independence in matters of thought; and second, equality of opportunity in matters of action. These demands have in no degree been modified by the subsequent changes in the industrial system; they have

rather, been intensified by the growing spirit of democracy. Notwithstanding this, however, a new conception of industrial liberty has been rendered necessary by the needs of a new industrial order. The institution of private property, as defined in the eighteenth century, worked fairly well so long as tools were an appendage to the worker, but it fails to guarantee equality in opportunity now that the worker is an appendage to the machine. The fundamental principle in the theory of Anglo-Saxon liberty is, that the fruits of liberty can be reaped by him alone who has a voice in determining the conditions under which he lives. This is the defense of popular government, and the same argument applies to industrial association. It follows from this line of argument that in the industrial world the possession of property is essential to industrial liberty.

The assertion that property is essential to liberty should be the occasion of no apprehension. It is as old as the conception that the essence of liberty consists in a proper correlation of rights and responsibilities. He who reads with a discerning mind those writers who developed the theory of industrial individualism, will perceive that the ability of a careful and energetic man to acquire property, and through property to control the the conditions under which he works, was an assumed, though frequently an unexpressed premise of all their arguments. The same thought underlies the theories of prosperity incorporated into the writings of professed economists. By reference also to the proposals of industrial reformers which have claimed, or are claiming, the

attention of our own time, it will be discovered that they all agree in the assertion that it is impossible for a man to become master of himself without acquiring control over the opportunities of labor. What else can the doctrine of the English economists respecting the importance of personal savings imply? What other meaning can be given to the theory of co-operation, the aim of which is to make all laborers capitalists, if it be not that by becoming a proprietor one becomes his own master? How are we to understand the arguments for profit sharing, which urge that one of the perquisites of proprietorship be granted to the worker, except it be assumed that in this manner the worker is made a co-partner with his employer? The same thought lies at the basis of communism, collectivism, and socialism, all of which seek to guarantee men industrial liberty by converting the communal or political organization into an industrial corporation in which all men shall be share holders by virtue of being citizens. We are not concerned with the feasibility of these programmes of reform. They are referred to in this connection because the persistence of an idea is presumptive evidence that it pertains to the conditions out of which it springs; and it is indeed significant that the only ground common to all writers upon social affairs (with the single exception of those who believe in the Tory idea of society) is found in the phrase, that industrial liberty is impossible without industrial property. All recognize, in principle at least, the necessity of a property which shall become an universal possession in order that the character of the

worker and the technique of production may conform to the motives of independence and the conditions of self-possesion. In no other way can the sense of independence and the sense of responsibility be made universal. In no other way can the fruits of liberty in industry be realized.

But what is this new property, the peculiarity of which is self-diffusion among the workers? This is a question which I admit frankly I cannot answer, but I would not concede it is not worth the asking. It is strictly within the method of scientific investigation to assert the existence of a body or a quality that has not yet been discovered. The astronomer by mathematical reasoning discerns where there must be a planet, and then searches until he discovers it. The chemist arranges compounds in a series, some of which are known, and asserts as a working hypothesis that all exist. In the same manner the economist, after setting in order the mental, the legal, and the psychic forces that make up the industrial life to which history points as the consummation of industrial evolution, is permitted, nay, he is compelled, to assert as a fact which probably exists and which it is reasonable to search for, any element or quality that the furtherance of that evolution demands. The existence of the property right which attaches itself to a citizen of the industrial world in much the same way that political right attaches itself to citizens of a democratic society, is rendered probable by its necessity. Its discovery is essential if liberty and responsibility are to be restored to the industrial order, and on that account its existence

may be assumed as a scientific hypothesis for the direction of industrial analysis.

While, however, it is impossible to say that this refinement of property right can at present be defined either in a lawyer's plea, or in the organization of business, three thoughts may be submitted respecting it.

It will, in the first place, rest upon a more perfect analysis of the productive process than the one which leads to the assertion that a man's possessions are the measure of what he or his ancestors added to the world's stock of wealth. It will recognize distinctly and formally the fact of social and associated production. It will rest upon the acknowledgement that that one does not fully enumerate the elements of productivity, when to the principle of division of labor described by Adam Smith, and the principle of associated labor groups developed by Mill, he adds the productivity of the entrepreneur function. This function, which is the discovery of modern economic analysis, stands forth in the person of the captain of industry, who, as a business agent, is regarded as a fitful genius of uncertain origin, for whom we should thank God, and to whom we should render payment according to the principle of rent. A new theory always develops slowly, and it is possible that this conception of the captain of industry, projected with such a show of certainty into the discussion of distribution, is a compound of ideas which, when resolved by further analysis into its final elements, will be of assistance in the truthful expression of the respective rights of all parties associated for industrial ends.

Certain it is that association is responsible for an increment of product peculiarly its own. And it is equally certain that no theory of association can satisfy the mind which ignores the slow development of the habit of submisson on the part of the great mass of men, without which the captain of industry would be a martinet over a savage hoard; or which ignores the hereditary transmission of aptitudes and skill, which is no unimportant factor in the industrial development of a people; or which ignores the slow accumulation of mechanical knowledge and the crystallization of that knowledge into mechanical inventions; or, indeed, which ignores any of those facts of history or observation that make nationality in industry and prove the race greater than the man. These suggestions are not new. They are, on the contrary, the common thought of socialist writers, and the fact that they are made the premise of socialist conclusions seems to have led economists who appreciate the grandeur of English jurisprudence to overlook them or to deny them. Such an attitude, however, invites the decay of English jurisprudence. It arrests the development of economic science, and encourages the substitution for it of the science of industrial administration. To deny the fact of social production, and thus preclude the possibility of a development in the idea of property, is not only unfortunate, but there is no justification for it in the nature of the case. Individualism does not consist in living in isolation, but rather in dwelling in a society of recognized interdependencies. Its development is marked by the re-

gress of self-sufficiency and the progress of association. The aggregate of benefits which result from social living is each year traceable in a less degree to what man does, and in a greater degree to what men do. The source of the increment of product is the new relations that men enter into, and not the increase in personal wisdom, skill, or application. The modern productive process is undoubtedly a highly socialized process, but this is no reason why each individual must be swallowed up in society. Provided analysis keeps pace with differentiation so that each specialized social service may be expressed as a social claim, and made the basis of a personal right, the theory of individualism underlying English jurisprudence is as applicable to a complex as to a simple condition of industry. The development of jurisprudence that is needed, therefore, does not pertain to fundamental principles. It must address itself rather to the clarification of those concepts dimly present in all industrial controversies. It is a common law development and not a constitutional change, or a statutory enactment, that is needed. Political economy was brought by John Stuart Mill as far as it was capable of being brought under the eighteenth century conception of property, and the further evolution of industrial theory, as well as the reconstruction of the legal framework of industrial society, must begin with the modification of the concept of property, if any progress is to be made in industrial science or industrial administration.

My second thought respecting that which, by courtesy of your imagination I have termed the workmen's prop-

erty, is that its clarification will take place through the evolution of collective bargaining and the formal labor contract. Some steps toward collective bargaining have already been taken. Trades-unions are no longer indiscriminately condemned; strikes are no longer considered universally illegal; the law of conspiracy, also, is coming to be confined within its legitimate sphere. At the same time it cannot be said that the situation has been heartily accepted by either party to the controversy. Employers still assert their purpose to bargain with individual employees, and the employees still show a timidity, amounting at times even to cowardice, in the presence of definitely expressed responsibilities. Both appear to think their liberty to consist in being a law unto themselves, rather than in the discovery and measurement of their respective rights in view of the new industrial conditions under which they are obliged to live. Neither appears to recognize that the sociology of the industrial process has rendered collective bargaining imperative, in order that due regard may be paid to the instinct of individualism by which both are impelled. The one thing needed is a true analysis of the situation, and a satisfactory exposition of the advantages that would accrue from the labor contract. This service is the high privilege of economy, but it must be an economy that rests on history, that is motived by a passion for liberty, and that is directed and limited by a knowledge of jurisprudence.

Of the labor contract itself, little can be said with confidence. It is likely that it will provide for determining

pay for the work after the work is done; that it will secure to each worker an industrial home; that it will provide for a board of arbitration in each industry. This, indeed, will, in all probability, be its most significant clause, and it is likely that the by-laws of this court of arbitration and the decision which it renders upon such questions as are presented to it, will through a process of natural selection eventually come to be a common law of labor rights. Arbitration thus established would result in a valued possession or privilege of the worker, and on this account he would become a responsible party in the world of industrial association. He would be the proprietor of the rights which the board of arbitration defined.

My third suggestion respecting property rights adjusted to the needs of modern industry is, that the sociology of the industrial process renders it necessary, wherever the interests of society at large are concerned, to lay increased stress upon the theory of industrial agency. This concept is not strange to English jurisprudence, although it has been overgrown, in late years, by the assertions of self-aggrandizement. There is no necessity for the development of a new principle, but rather for the return to an old principle well recognized by common law. The problem to which this thought leads is forced upon our attention by the evolution of corporations, trusts, and great industries; and it is referred to in this connection for the purpose of saying, that the theory of property adjusted to the needs of our time is of a dual character. It must first express the

rights of individuals associated together in an industrial unit; it must, next, express the duties of these industrial units to the public at large. The former constitutes the labor problem and the test of its solution should be freedom for the individual to realize himself. The latter constitutes the monopoly problem and the aim of its solution should be the attainment of a just price and the preservation of industrial mobility. Provided these rights can be discovered and expressed in such a manner that they may be incorporated in a contract, on the one hand, and in legislative enactment, on the other, there is no reason in the nature of the case, why harmony cannot be restored to the industrial world, and why the science of Political Economy may not recover that symmetry and form of which it has been deprived by the trenchant criticisms of the last fifty years. As an hypothesis for constructive analysis leading to so desirable a consummation do I offer the suggestions contained in this paper to the members of the American Economic Association.

DISCUSSION OF PRESIDENT ADAMS' ADDRESS.[1]

PROFESSOR ARTHUR T. HADLEY, YALE UNIVERSITY.

I wish to preface my remarks by expressing my admiration of the way in which President Adams put with so much force many things that we have all been thinking. My suggestion would be that he perhaps put these things with a little too much force, and that there may be a danger in such forcible presentation of thoughts not fully worked out.

My first criticism is historical rather than economic. "It is inseparable," said our President, "from the Anglo-Saxon idea of liberty that the people should have a share in political control." But English constitutional history shows that the idea of liberty was dissociated from the idea of legislative power. The Anglo-Saxon conception of liberty is distinguished by the assurance that precedent will be impartially followed, rather than by the power of those who enjoyed liberty to change such precedents.

Secondly, it is questionable, to my mind, whether the changes in our industrial and economic conditions are as radical as our President holds. There has certainly been some change during the period in question; but the fundamental character of industrial and economic conditions has been the same. President Adams seemed

[1] At the morning session of the Association, December 29, 1896.

to me to imply that new ideas had recently been introduced into our legal system, such, for example, as the perpetual life of corporations. This is open to criticism in that the principle of perpetual succession was well understood and valid in the corporations of the seventeenth century. The East India Company was perpetual, monopolistic, and exclusive to the last degree.

Again, it seemed to me that the evils resulting from the changes in business conditions were too strongly emphasized; and so, also, the suggestion that the separation of buyer and seller in modern corporate enterprise had abolished business courtesy. In practice the old non-competitive or bargaining system is an abominable one. I had much rather deal with the Pennsylvania railroad than a Neapolitan shop-keeper, and should feel much surer of essentially courteous and fair treatment.

What is needed is an accentuation of the principles and tendencies of English jurisprudence: not a new jurisprudence. What the poor man needs is the vigorous and intelligent enforcement of responsibilities,—an enforcement which now is often one-sided, partial, and unfair. The President's address seemed to make out a stronger case against the movements of the immediate past than historical tests will warrant. Progress probably will best be made by putting increased emphasis on the side of responsibility. Morals and jurisprudence will best develop by going forward along the old lines; not by going backward to the starting point and then beginning anew in a different direction.

PROFESSOR FRANKLIN H. GIDDINGS, COLUMBIA UNIVERSITY.

The President's address seemed to me to be a conservative view of the policy that industrial communities will have to adopt in order to bring about industrial peace. I understood Professor Adams' chief contention to be that there are easily distinguishable lines of jurisprudence which apply to industrial conditions. One is the absolutist jurisprudence of duties, the other is the democratic jurisprudence of rights. Law as a system of rights is carried out by enforcing contracts, and this is accomplished by putting the property of the contracting parties in jeopardy. Responsibility, in this sense of liability to the loss of property, is the corner-stone of the jurisprudence of rights as distinguished from a jurisprudence of duties. If one of the parties to the contract has no property to be lost when he violates the terms of his contract, his conduct will be rash and contracts will be broken. These conditions often lead to arbitrary conduct by the party who is wronged.

These considerations lead us to seek for that moral or ethical property of the workingman which is not yet recognized in law, but which if recognized could be put in jeopardy by a breach of contract. There is such a property. The law recognizes the right of the worker to demand the payment of a money wage for work done. Does it also recognize the value of a faithful devotion to an employer's interests for a long term of years? As a question of ethics, is not a faithful and self-denying service often an unrequited service? Can it in anyway be recognized in law?

If a man has long been a faithful employee, it seems to me that he is entitled to a reasonable notice of impending dismissal, and that the notice should be proportionate to the length of the faithful service. The thing most bitterly complained of by the employees of corporations is the liability to dismissal without notice. Stories of summary dismissals of faithful employees of corporations are common. In lieu of reasonable notification the employee should be entitled to a money damage. Such a right, created by law, would be a form of property. If the employee fails to fulfill his part of the contract, this property right should be forfeited.

PROFESSOR C. S. WALKER, MASSACHUSETTS AGRICULTURAL COLLEGE.

I have no criticism to offer on the address of our President, but rise to offer a suggestion in the form of a question. Would it not be possible to have some real tangible property to levy upon in case of breach of contract by the laborer? As it is, in case of such breaking of contract on the part of the corporation, damages can be obtained from the plant and franchise of the corporation. No damages can be collected, however, if the other party, the non-property holding laborer, breaks his contract. But why should not the trades-union to which the laborer belongs have a trust fund, and then as a corporation furnishing labor make a contract with the corporation requiring labor, pledging its fund in case of a breach of contract on its part or on the part of one of its members? Trades-unions are accustomed to keep a large fund on hand from which to pay stipends to men out on a strike

and to meet other expenses: why not use a portion for a guarantee?

PROFESSOR L. S. ROWE, UNIVERSITY OF PENNSYLVANIA.

The great value of the analysis of economic and legal relations contained in the President's address is to be found in the emphasis of certain tendencies which demand recognition in our system of jurisprudence. I shall therefore, confine my remarks to the examination of these tendencies rather than to their practical application.

In the address the contrast between legal principles and industrial relations was approached from the twofold standpoint of the employer and employee. As regards the former the discussion has been confined to the corporate problem. It requires but a cursory glance at the history of corporation law to demonstrate the wide departure from the early idea of the corporation,—the idea of an agent of the state endowed with certain of the elements of state perogative. The logical development of this early idea would have resulted in the enforcement of a strict accountability to the state, which we at present lack. The purely private law concept of limited liability has overshadowed all other considerations. The important point to be noted in this connection is the fact that the consistent application of the "state perogative" idea would have furnished the legal basis upon which the doctrine of intangible property rights, referred to in the address, and at present represented by the "franchise," might have been further developed.

But how does the question shape itself with reference to the working classes? President Adams dwelt upon the fact that our present system fails to enforce the principle of individual responsibility, as far as the laborer is concerned. This has been due to the fact that up to the present time the basis of enforcement has been the possession of real or personal property of a tangible character. Is it possible to detect any departure from this rule of interpretation in the law of contract? My examination of the subject leads me to believe that such a change is very gradually being effected, at least the way has been prepared. The coercive power of threatened exclusion from certain social opportunities or industrial possibilities; the possibility of exclusion from the benefits of a system of industrial arbitration; from the advantages to be gained through membership in legally recognized labor organizations,—may come to form as efficient a means of enforcing individual responsibility against the workingman, as the more tangible property interests of the employer and the intangible "franchises" of the corporation. This development would carry with it the necessity of developing the new class of rights referred to in the address. Viewed in this light,—as a question of tendencies rather than a question of practical mechanism—the principles developed in the address must become of great importance in the adjustment of relations in the industrial world.

PROFESSOR HENRY W. FARNAM, YALE UNIVERSITY.

The breach of contract most common among wage re-

ceivers occurs in the strike, when they deliberately give up their employment. To secure them a new right of employment, and then threaten to withdraw it as a penalty for breach of contract, would be ineffectual, when experience shows that they consider it no serious sacrifice to surrender this very employment in order to carry their point. Such a policy would increase the responsibility not of the wage receiver, but of the employer. Collective bargaining seems to me a more practical suggestion for preventing breach of contract than the new vague property right suggested.

PROFESSOR GEORGE GUNTON, OF NEW YORK.

The idea suggested by Professor Giddings is in operation as a general practice in the factory districts of England. It is a rule throughout Lancashire and Yorkshire, that the laborer cannot be dismissed without notice, except in cases where he spoils his work, or is palpably inefficient. This rule, however, is not regarded with special favor by the laborers; it tends to restrict their freedom of prompt and instantaneous action. The wage classes in general would rather take the risk of summary dismissal than forfeit the right of leaving their employment immediately when dissatisfied. In fact, the introduction of the time notice, and especially of long time notice, has always been regarded as from the employer's side. I remember that in 1875, at the conclusion of the great strike in Fall River, Mass., an iron-clad contract was forced upon the laborers, providing that a notice be required on both sides before the employment could end.

If the laborers left without such notice, they were to forfeit the wages due, then in the hands of the corporation, which is a rule that prevails in England. This was regarded by the laborers as a stipulation wholly in favor of the corporation. It would be very difficult to introduce into legislation a rule by which laborers should receive notice before dismissal based upon their fidelity, efficiency and length of service, because no safe rule could be made covering such things. Nor does it seem at all necessary. Such an idea rests on the assumption that in cutting down or otherwise re-arranging the working force, employers select for summary discharge those whose services have been the most efficient and longest. But such is not the case. That would be contrary to the manifest self-interest of employers. Only fools would be guilty of such conduct, and whatever may be said of corporation management in other respects, it cannot be charged that they are economic fools. It is always the inefficient, the irregular, and transient that are to be weeded out, when opportunities arise.

PROFESSOR EDWARD CUMMINGS, HARVARD UNIVERSITY.

It may be observed, in passing, that there has been some tendency in this discussion to a mechanical separation and contrast of the economic and the ethical aspects of the question under consideration. It is hardly necessary to insist that such a contrast is superficial; that the conclusions of sound ethics and of sound economics are essentially at one.

On the other hand, the discussion of the mutual re-

sponsibility of employer and employees, and of the proposal to remedy the present unsatisfactory conditions by creating for laborers a new kind of property in the right to employment, has presented a very one-sided view of the difficulties of the present situation. While it is proper to emphasize the unquestionable right of trades-unions to exist, and to do business with employers by means of responsible agents, it is equally to be remembered that a great obstacle to improved relations between labor and capital at the present time is the difficulty of finding trade-unions in this country which are organized upon business principles, with any such agents ready or able to keep the agreements they claim the right to make. If, therefore, the laborer is to have new rights created for him, he ought also to have new duties; and first of all he ought to assume old duties and responsibilities, inseparably connected with that right to organize upon which he has so strenuously insisted.

Moreover, it is to be borne in mind that there are many reasons why capital has today special claims to protection from the irresponsible organization of labor, as well as labor to protection from irresponsible organization of capital. There are reasons for believing that the heavy burdens of constant industrial reorganization tend to shift more and more upon capital. The rapid march of inventions and improvements in machinery subjects productive investments to greater and greater risk of being superseded and rendered prematurely worthless; while at the same time the loss to superseded skill and labor happily finds at least some compensating tendency in

the greater mobility of labor and the shorter apprenticeship which machinery makes possible. Capital, therefore, is deserving of consideration in proportion as its share of necessary waste and cost in industrial progress tends to increase.

It has already been suggested that present conditions would be improved, and responsibility more equally distributed, by some form of contract between the employer and the employees which should provide for adequate deposits of money by both sides, as a pledge of their intention to be bound by the agreement. Such a plan, with the necessary machinery of a joint committee and a standing board of arbitration, has recently been tried in England. It must be confessed, however, that the labor organizations of this country suffer greatly from lack of business-like methods, lack of good leadership, lack of sober intention to undertake the serious business of negotiating with employers for the sale and future delivery of labor. What they need at the present moment is not so much new rights, as a kindly and vigorous insistance upon the assumption of the responsibilities they have already incurred, of duties belonging to the rights they have already secured.

PROFESSOR HENRY C. ADAMS.

The impression which is left upon my mind by this discussion, and I need not say how deeply interested I am in it, is that there is some danger connected with using old words for new ideas. Professor Commons remarked to me last evening that it seemed to him

unfortunate to employ the word "property" in any but the established and accepted meaning. "For," he remarked, "it tends to introduce confusion into a subject that might be presented more clearly by giving specific illustrations of the new rights which laborers are at liberty to urge on account of new industrial conditions." I appreciate very keenly the pertinency of this criticism, and many of the remarks which have been submitted in the course of the discussion this morning emphasize its pertinence. But before consenting that it is unwise to employ the word property in a new sense, it may be well to inquire if the confusion of ideas has been occasioned by my use of this word, or does it exist in the situation itself? As it appears to me, one who analyzes the labor situation at the present time, finds himself groping after an idea for which there is no adequate expression. Could it be expressed, however, and become a real thing by being embodied in contracts, it would hold to the laborer the same relation that what we now know as property, holds to the proprietor, his employer. If we look at the matter historically, it is clear that the word property has not always meant the same thing. On the contrary, it suggests to the mind a series of rights that have been acquired from time to time; and if the labor problem is in essence what I hold it to be, the social and industrial changes essential for the working out of that problem will add yet another concept to that series of rights and privileges which the past evolution of the English speaking people has crystallized into the word property. At best, one who discusses this problem is reduced to the alternative of using old words with new meanings, or of

coining a new word, which could not be understood until explained. For many reasons, I am constrained to believe that, in the long run, greater advantage will accrue from the employment of the word property with a slightly altered meaning than from the coining of any new expression. It is the common method of historic evolution.

It was remarked by one speaker that it seemed to him wiser to follow out in an orderly manner the evolution of society from the point to which it had now come, rather than by retracing our steps to select some other point from which to proceed. The impression seemed to be, though I may have misunderstood the remark, that the address set before itself some mechanical adjustment of labor relations which might be in harmony with a past condition of industry but which found no warrant in the established principles of jurisprudence. If this be the meaning that was intended, I must again plead the apology of a misconception. The only merit possessed by the suggestions contained in the address is found in the fact that they express in language pertinent to the present situation, the principles which have proved themselves adequate in every social crisis sustained by the English speaking people since the thirteenth century.

It is undoubtedly true, as was asserted by yet another speaker, that the burden of modern industry rests upon the shoulders of the employer, while the laborer escapes both the burden and the responsibility. This was fully recognized. It was largely because this is true that the address contended for the creation of a property in the

hands of the worker, for in this way only can he become a responsible person in the world of contracts and bear his share of the responsibilities for the orderly administration of industry. Not only is there no liberty for the worker without a property, but there is no stability to industry, unless in some way he is made responsible for the fulfillment of his contracts; and this, as was pointed out, can only result from the possession of some privilege or advantage that he can place in jeopardy.

But I will not continue these remarks. They are but repetitions of what the address has already expressed. I should like to say, however, before taking my seat, that it was not intended to leave the impression that a corporation as an organization was not influenced by the idea of continuity or perpetuity of life previous to the nineteenth century. As a matter of fact the early charters of English corporations were limited to seven years, so that my statement technically was correct. The idea which it was intended to convey, however, was that in the nineteenth century for the first time have men, associated together for private business ends, accustomed themselves to regard their association as a body of continuous life. This fact of continuity is doubtless inseparable from a corporation, and it is largely because this is true that we cannot consent to the opinion that a corporation can be a purely private affair.

Permit me to thank the members of the Association for the interest which they have shown in this paper and for the courtesy with which they have discussed it.

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